

# ASSET-STRIPPING THE PEOPLE

*Asset forfeiture laws around the globe are most likely to have adverse impacts on innocent people rather than on the criminals they are supposed to target.*

by Susan Bryce © 2001

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## AUSTRALIA'S PROCEEDS OF CRIME BILL 2001

When Federal Parliament reconvenes in 2002, Australians are likely to be confronted with a plethora of new legislation striking at the heart of civil liberties and freedom. In the wake of the terrorist attacks on America, new draconian counterterrorism measures have been proposed by Federal Cabinet and legislation is being prepared.

The new legislation, likely to gain the support of both major political parties, will supplement the existing warranting regime under which the Australian Security Intelligence Organisation (ASIO) exercises special powers. A new "general offence" of terrorism and an offence related to preparing for or planning terrorist acts will be introduced. The Proceeds of Crime Act 1987 will be amended to allow terrorist property and assets to be frozen and seized.

Attorney-General Darryl Williams says the legislation is being introduced on the basis that "we must remain vigilant and take appropriate defensive measures". The laws are likely to get the green light, despite the fact that Australia already has well-practised and cooperative counterterrorism plans and a raft of Commonwealth, State and Territory legislation dealing with terrorism. A sweeping review of national security legislation was undertaken prior to the Sydney 2000 Olympic Games, resulting in the passage of the Defence Legislation Aid to the Civil Power Act 2000. Introduced without a sunset clause, the Act gave security forces wide-ranging powers, and for the first time in history the military gained the legal authority to shoot to kill citizens.

The new Bills are likely to emerge via a wave of media and political hysteria calling for "homeland" security. Among the new legislation will be a rehashed Proceeds of Crime Bill 2001, which was tabled at the last session of Federal Parliament. The Bill would implement a regime of civil forfeiture of assets, in line with international trends. It has the support of the Liberal Government and Labor Opposition.

## WHAT IS ASSETS FORFEITURE?

Forfeiture means that the government can seize property that has been gained as a result of a crime or an alleged crime; for example, drug trafficking, people smuggling or money laundering.

There are two types of forfeiture procedures.

- **Criminal forfeiture:** This requires the defendant to be found guilty of the crime in a criminal court before property can be seized. In Australia, this action comes under the Proceeds of Crime Act 1987. In these cases, legal representation is a right and the jury must find "beyond a reasonable doubt" that the property was integrally connected with the crime.

- **Civil forfeiture:** This occurs when the government shows "probable cause" to initiate proceedings, "innocent until proven guilty" is reversed and the property owner generally has the burden of proof that they are innocent. Since the forfeiture is a civil—not criminal—proceeding, the right to a trial by jury is often denied, plus defendants are not entitled to legal representation unless they can pay for it themselves (a difficult task, since often the seized property is the defendant's only asset).

The Proceeds of Crime Bill 2001 is based on civil forfeiture proceedings.

## PURPOSE OF THE AUSTRALIAN LEGISLATION

The Proceeds of Crime Bill 2001 would allow a court to freeze and confiscate assets where the Director of Public Prosecutions (DPP) can prove to a court on the "balance of probabilities" that a person had engaged in serious criminal activity in the previous six years. No criminal conviction would be required before confiscation could occur. The proposed forfeiture law would apply to suspects engaged in certain serious Commonwealth offences punishable by three years' jail or more—offences such as drug trafficking, money laundering, people smuggling and serious property offences. The new regime would operate alongside the existing conviction-based confiscation regime. The legislation also would allow for assets and cash shifted offshore to be retrieved.

The proposed Proceeds of Crime Bill 2001 is driven not by need but by police hype, political pressure and United States insistence that the rest of the world imitate its mistakes. Under the Bill, introduced by Justice and Customs Minister Senator Chris Ellison, the Commonwealth would be able to confiscate assets with a court's approval. The Commonwealth would have to show that, on the balance of probabilities, those assets are the profits of serious criminal activity. This means that the traditional common law principle, "innocent until proven guilty", would be discarded and "the balance of probabilities", which arguably amounts to little more than suspicion of guilt, would be deemed enough to result in a serious and apparently irrevocable loss of people's life-support systems: their money, their homes, property, cars and other possessions.

The Proceeds of Crime Bill 2001 also introduces provisions for the forfeiture of "literary proceeds". Literary proceeds can be broadly defined as profits or benefits derived by a criminal as a result of the publication, in any form, of details or experiences related to that person's crime or life of criminal activity. The expression "literary proceeds" also includes "chequebook journalism" as related to criminal activity.

## BACKGROUND ON ASSETS FORFEITURE IN AUSTRALIA

Australia's civil and criminal assets confiscation legislation has its roots in the War on Drugs. In 1987, the Proceeds of Crime Act came into operation. Under the Act, the authorities gained the power to confiscate assets or money used in, or acquired as a result of, offences against Commonwealth or Territory laws.

In December 1991, the Confiscated Assets Trust Fund (CATF) was established. Since then, all assets recovered under the Proceeds of Crime Act and under the narcotics-related provisions of the Customs Act 1901 have been paid into the fund rather than consolidated revenue.

Presently, the Attorney-General must determine, at least

once a financial year, how much of the funds is available for distribution. Then, half of the balance is paid to law enforcement projects selected by the Attorney-General. The other half is paid to drug rehabilitation and drug education projects chosen by the Minister for Health.

According to the most recent figures available (1996), a total of A\$29.8 million has been paid into the trust fund since it was established. Most of the money—\$26.4 million—came from the Proceeds of Crime Act. Other sources of funds were: section 243 of the Customs Act, \$34,000; other sections of the Customs Act, \$3.3 million; and section 9 of the Crimes Act 1914, \$22,000.<sup>1</sup>

## THE PROPOSED ASSETS FORFEITURE REGIME

The Proceeds of Crime Bill 2001 originates from the recommendations of the Australian Law Reform Commission (ALRC) report, "Confiscation that counts: A review of the Proceeds of Crime Act 1987".<sup>2</sup>

The ALRC report recommends that the Commonwealth should adopt a civil forfeiture scheme, where the identifiable proceeds of crime could be recovered without the need for a criminal conviction. In proposing this regime, the Commission rejected the notion that recovery of profits from unlawful conduct is an adjunct of the criminal law process and, as such, should apply only to conduct that is criminal and has been proved "beyond reasonable doubt". Instead, the Commission asserted that the recovery of the profits of unlawful activity, on proof of unlawful conduct on the civil onus of "on the balance of probabilities", is justified. To support this view, the Commission relied on the principle that no one should be entitled to be unjustly enriched on the basis of conduct that is criminally or civilly unlawful.

The Liberals recommended the adoption of the ALRC's recommendations, resulting in the next phase

of the fight against crime, the war against drugs and now the effort to combat terrorism: the Proceeds of Crime Bill 2001.

## OBLIGATIONS UNDER INTERNATIONAL TREATIES

The United Nations has played a key role in the development of the trend towards civil and criminal assets confiscation.

The 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances recognised the international dimension of the drug trade and its associated money laundering activities. The Convention contained what could be termed as mini extradition and mutual assistance treaties. The Convention obliges the parties to have laws which criminalise drug-related money laundering, enabling them to trace, bring under control and ultimately confiscate proceeds of drug trafficking both domestically and at the request of other party states.

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Convention and ratified it in November 1992. The Convention came into effect for Australia in February 1993.

At the invitation of the Council of Europe, Australia also participated in the development of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. Following ratification, this Convention came into force for Australia on 1 November 1997. It contains similar obligations to those in the UN Convention, but in relation to criminal conduct not restricted to drug trafficking. Australia was the first country not a member of the Council of Europe to become a party to that Convention.

The effect of Australia's becoming a party to the conventions is that the enactment of assets forfeiture laws in all Australian jurisdictions to the extent provided for in the conventions, and which had preceded the entry into force of the conventions, must be maintained if Australia is to continue to fulfill its international legal obligations.

### THE GLOBAL TREND IN ASSETS SEIZURE

The push for civil asset forfeiture laws is part of a global trend in democratic states.

In March 2001, a Proceeds of Crime Bill was proposed by the UK Parliament. The Bill sought to give police new powers to seize cash and property believed to be the proceeds of criminal activities. As in Australia, the UK Bill threatened the common law tradition that people are innocent until proved guilty and it was immediately condemned by civil libertarians. Under the UK legislation, still under consideration,

the government would establish a Criminal Assets Recovery Agency (CARA), responsible for tracking down criminals' assets and taking away their money. The UK legislation would also seek to allow the tax system to be used to land suspects with huge demands for payment, when other efforts to investigate and seize the proceeds of crime have failed. Other new powers include the ability to freeze assets as soon as investigators begin examining a suspect's affairs.

In Canada, the federal government has made several attempts to introduce civil asset forfeiture initiatives. One recent legislative attempt, Bill C-81, sought to turn financial managers into police informants, grant Customs officers the power to strip travellers of undeclared cash and create a new bureaucracy to sift through financial records without a targeted individual's knowledge or consent. All this is supposedly necessary to combat the scourge of "money laundering" and to help take away from criminals the proceeds of their crimes.

Assets forfeiture laws have existed in the USA for more than 20 years and have enabled law enforcement agencies to strip citizens of billions of dollars in cash and property with little or no recourse.

In the USA, some state laws protect people from having property forfeited by police unless they're charged with a crime. But under US Federal law, authorities don't even need a criminal charge to seize property. In fact, experts estimate that most seizures occur without a criminal charge being laid.

Most state laws require that forfeitures be ordered by a judge. Federal law enforcement has the power to order forfeitures without a judge, and does in most cases. Sometimes police may seize money they believe is linked to drugs, but they can't prove it under state standards and they don't want to give the money back to a suspected drug dealer. US Federal law lets them take the money out of the owner's hands.

### WHO BENEFITS FROM FORFEITED ASSETS?

The Proceeds of Crime Bill 2001 is an open door for the Australian Government to increase its revenue. The Bill's explanatory memorandum says "it is not possible to estimate the cost of bringing confiscation proceedings, or of preserving and realising property that is the subject of orders under the Bill; however, it is expected that the revenue generated from the confiscation of property will more than offset the investigative and legal costs in bringing proceedings and administering property".

One of the basic premises of assets forfeiture legislation is

that proceeds of crime will be used to fight crime itself or to bolster critically rundown government services. Health, education and welfare services are some areas where the proceeds are typically allocated.

However, as US experience demonstrates, forfeited assets often stay in the hands of law enforcement agencies. Hundreds of examples are cited on the database maintained by the organisation FEAR, Forfeiture Endangers American Rights.<sup>3</sup> FEAR is a national nonprofit organisation dedicated to reform of Federal and State

asset forfeiture laws to restore due process and protect property rights in the forfeiture process. Several shocking examples cited by FEAR include:

- A North Carolina State Highway Patrol trooper stopped a driver on Interstate 95 for tailgating. A police dog signalled that drugs were in the Toyota, where troopers found US\$105,700 and two grams of marijuana. The driver denied owning either the drugs or the money. The Highway Patrol gave the money to the Drug Enforcement Agency (DEA), which returned more than \$80,000 to the State Patrol, even though North Carolina law generally requires seized money to be sent to Education.

- A Georgia trooper stopped a 1996 Monte Carlo for speeding on I-95. After the driver and passengers gave conflicting stories, the trooper searched the car and found a hidden compartment containing \$7,000, which the driver said was from savings. The patrol turned over the money to the DEA, which in January returned \$5,440 to the patrol. Under Georgia law, forfeited money should go to the State's general fund.

- In 1996, the Missouri Highway Patrol stopped a Volkswagen Golf for speeding, searched it because the occupants seemed suspicious and found \$24,000. No drugs were found and no one claimed the money. The patrol gave it to the DEA to be forfeited (the legal term for "confiscated").

Most people believe the official rhetoric, that assets forfeiture is designed to confiscate the luxurious possessions of

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drug kingpins—yachts, fast cars, planes and second homes obtained through the proceeds of drug deals. However, the public image has little to do with reality.

In America, forfeitures often occur to ordinary people who happen to find themselves in a situation in which they are simply suspected of having been somehow involved in criminal activity, whether those suspicions ever prove out or not. A database maintained by the US Drug Enforcement Agency indicates that 83 per cent of the property seized from June 1989 to December 1990 via assets forfeiture laws was valued at less than US\$50,000 (usually much less).<sup>4</sup>

#### POTENTIAL PROBLEMS OF THE AUSTRALIAN LAW

If the US experience is any indication, the Australian legislation may well end up penalising many petty criminals, and victims of the legislation will either have to fight in court to get their property back (which can take years) or, worse, they will be unable to recover their assets at all, despite their proven innocence.

While the Australian legislation requires a court decision for assets to be confiscated, the Proceeds of Crime Bill 2001 is obviously intolerable and is another step towards a dictatorial Big Brother State. The Bill, in its present form, poses many problems:

- The legislation could potentially be used where criminal convictions in court fail. Civil forfeiture could be used to sidestep normal criminal procedures.
- It would be up to suspects to prove they earned their cash and property legally.
- The legislation potentially could allow police to go on "fishing expeditions" against anyone whose conspicuous wealth cannot immediately be explained.
- The proposals of the Bill undermine the presumption of innocence and could create a system in which accusations by the police might be sufficient to force people to disclose all their private financial affairs.

#### TWO PARTIES, ONE GOAL

During 2000, Shadow Justice Minister Duncan Kerr introduced into Parliament a Private Member's Bill: the Criminal Assets Recovery Bill 2000. Announcing Labor's intention to make assets forfeiture an election issue, Kerr claimed: "...quite clearly...it is Labor which is setting the agenda on drugs policy... The civil forfeiture regime introduced in this legislation will allow law enforcement agencies to ask a court to confiscate property believed to be the proceeds of serious criminal activity, without waiting for a conviction... Before confiscating the property, the court will have to be satisfied on the balance of probabilities that it was illegally obtained or bought with the proceeds of illegal activity."<sup>5</sup>

A number of problems were raised by the Senate Committee charged with reviewing Kerr's Bill.<sup>6</sup> The Committee reported its concern that the Bill: "...seems to attach grave

consequences to what are essentially suspicions. Assets may be removed from a person's control, without that person having a right to be heard on the matter, simply because there is a reasonable suspicion that they are connected with serious criminal activity. Assets may be confiscated simply because it is more probable than not that someone, at some time, has been involved in serious criminal activity. Incriminating material may be obtained under compulsion and is only inadmissible where a person objects to producing that material. The long-established protections imposed by the criminal law and, in general terms, recognised in the existing Proceeds of Crime Act 1987, are here avoided because they are seen to be inconvenient or to hinder law enforcement.

"For the purpose of giving effect to that process, the civil standard of proof, namely on the balance of probabilities, is applied, rather than the criminal standard of beyond reasonable doubt. To that extent, this is a diminution in rights. In the same manner, this Bill seems to trespass on the rights of persons who have neither been charged with, nor convicted of, any wrong-doing. The Committee, therefore, seeks the advice of the member sponsoring the Bill as to the reasons for diminishing rights where there is only suspicion of, or likely involvement in, serious criminal activity."

Despite the obvious threats to civil liberties, assets forfeiture has remained a key plank of the Australian Labor Party's commitments in the lead-up to the Federal election on 10 November. According to the ALP's official election website:<sup>7</sup>

"Labor will introduce a federal civil confiscation scheme for the proceeds of serious crime against the Commonwealth. Under Labor's scheme, if it can be proved on the balance of probabilities that a person's assets are the profits of a serious crime against the Commonwealth, the Commonwealth can confiscate these assets. All

confiscated criminal assets will be placed into a specified fund. One third of the money in this fund will be allocated to law enforcement, and two thirds to health, education and research programs to deal with drug issues. This money will supplement core funding."

#### CIVIL RIGHTS UNDER THREAT

The Proceeds of Crime Act 1987, and most other Australian assets confiscation legislation to date, is conviction-based legislation; that is, the penalties it creates only become available upon a person's lawful conviction. The Proceeds of Crime Act 2001, if it goes into law,<sup>8</sup> will work independently of the criminal process and rely on other events to trigger its operation.

We cannot escape the conclusion that both the Liberal Government and Labor Opposition support the recommendations of the Australian Law Reform Commission regarding the

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introduction of civil assets forfeiture laws. Both parties evidently believe that infringing on civil rights has become a necessary weapon in the fight against crime, the war on drugs and the bid to combat terrorism.

For now, politicians and the compliant media will tell us that these laws will only be used to crack down on drug dealers, criminals and terrorists who are presently slipping through the cracks. However, the American experience quite clearly demonstrates that draconian enforcement methods do not work. If they did, American streets would not now be awash with more and better illegal drugs, at lower prices, than ever before.

History shows us that assets confiscation was used to great effect by Nazi Germany, Communist China, the Soviet Union and Pol Pot's Cambodia. These schemes would be another dangerous step down an extremely slippery slope.

### Endnotes

1. Australian Parliamentary Library,

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<http://www.aph.gov.au/library/pubs/bd/1996-97/97bd040.htm>.

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3. Forfeiture Endangers American Rights website, [www.fear.org](http://www.fear.org).

4. Cited in an article, "Asset Forfeiture", by Susan Meeker-Lowry, published in *Z Magazine*, <http://www.lol.shareworld.com/zmag/articles/jan96meeker.htm>.

5. "Labor sets the agenda on drugs and organised crime", Media Release, Duncan Kerr, 13 March 2001.

6. Senate Standing Committee for the Scrutiny of Bills, Digest 6 of 2001, 23 May 2001.

7. Australian Labor Party website: [http://www.alp.org.au/policy/platform2000/chapter\\_11.html](http://www.alp.org.au/policy/platform2000/chapter_11.html).

8. The Senate committee reviewing the Bill was due to report to the Senate on 22 October. However, no further developments are now expected until after the Federal election on 10 November [after we go to press. Ed.].

### About the Author:

Susan Bryce is an Australian journalist and author of more than 70 published research articles. Susan publishes the *Australian Freedom & Survival Guide*, which aims to undermine the pervading myths surrounding the corporate consumer culture, globalisation and the New World Order. *AF&SG* encourages public debate and questioning of issues which are fundamental to our future freedom and survival. These issues include genetic engineering, food irradiation and related issues, Big Brother and the international surveillance regime, corporate power and global governance, and self-sufficiency in the 21st century.

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